IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 990

JOSEPHINE V. HALL, *Petitioner,*

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

Comes now the above-named petitioner, by her attorney, and petitions for a rehearing of the petition for a writ of certiorari herein. The said petition for certiorari was denied April 6, 1942.

QUESTION PRESENTED.

The taxpayer was a beneficiary under a trust. From 1913 until 1928 the Commissioner of Internal Revenue failed and refused to allow either the beneficiaries, or the trustees, deductions for depreciation of improvements, or amortization of the leaseholds comprising the corpus of the trust. Upon the sale of the leaseholds in 1932, and the termination of the

trust, the Commissioner in computing gain reduced the basis of the leaseholds by deductions for depreciation and amortization for years prior to 1929, which he had failed and refused to allow in computing income for those years.

Is the taxpayer entitled to a refund of taxes paid on the proceeds of the sale by way of recoupment on account of taxes admittedly overpaid for prior years? The petitioner contends she should recover on the authority of *Bull* v. *United States*, 295 U. S. 247, and *Stone* v. *White*, 301 U. S. 532. The Court of Claims held that recoupment did not apply, relying upon *McEachern* v. *Rose*, 302 U. S. 56.

REASONS WHY THIS PETITION FOR REHEARING SHOULD BE GRANTED.

I.

This Court Has Recently Granted Certiorari in a Recoupment Case.

This Court has recently granted certiorari and decided No. 325, *Rodiek* v. *United States*,[1] which involved recoupment and alleged conflict with *Bull* v. *United States*, 295 U. S. 247, and *Stone* v. *White*, 301 U. S. 532.[2] The case at bar is in conflict with the *Bull* and *Stone* v. *White* cases.

If certiorari were granted in the *Rodiek* case because of the conflict with *Bull* v. *United States* and *Stone* v. *White*, justice demands that certiorari be granted in this case. Surely the Court will not hear one litigant on a question and, at the same time, refuse to hear another litigant on the same question. This is particularly true where the case heard was disposed of by an equally divided Court, with three Justices not participating.

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[1] Affirmed, *Per Curiam*, March 2, 1942, by an equally divided Court, with the Chief Justice, Mr. Justice Murphy and Mr. Justice Jackson not participating.

[2] Page 20, Petition for Certiorari and page 18, Brief for Respondent in Opposition, No. 325, October Term, 1941.

II.

There is an Admitted Conflict With a Decision of the Sixth Circuit.

The "Memorandum for the United States" in the case at bar admits that the decision below is in conflict with the decision of the Sixth Circuit in *Dixie Margarine Co.* v. *Commissioner*, 115 F. (2d) 445, stating:

> "* * * although the question was explicit in the *Dixie Margarine* case, the rule of the *McEachern* case was not considered by the Court nor was the decision even cited by the Government prior to the Government's petition for rehearing in the Circuit Court of Appeals."

Obviously, the Sixth Circuit must have studied all relevant decisions before deciding the *Dixie Margarine* case. If it had originally overlooked the *McEachern* decision, and the point involved therein, it was under a duty to grant the petition for rehearing when the case was called to its attention. Consequently, it must be assumed that the Sixth Circuit considered the *McEachern* decision, because it is unthinkable that a Circuit Court of Appeals would be derelict in its duty, and decide a case without reference to applicable precedents.

III.

The Question is One of Importance in the Administration of the Revenue Laws and is in a State of Confusion.

The problems presented in this case are varied, vital and recurring. They affect the United States as much as they do taxpayers.

The confusion is well illustrated by Judge Clark's dissenting opinion in *Lyeth* v. *Hoey*, 112 F. (2d) 4, (C. C. A. 2) wherein the Government took the position which the taxpayer takes in the case at bar. Judge Clark states, page 8:

> "The interesting, if difficult, problem here presented requires us first to interpret and reconcile Supreme

> Court decisions which the Court itself does not regard as conflicting."

At page 9, Judge Clark continues:

> "To date the principles of such recoupment have been only partially developed by the Supreme Court. It seems, therefore, that those are problems for the Courts."

Because of the uncertainty of the law, the United States has taken inconsistent positions. Thus we find the decisions: (1) that equitable considerations cannot override statutory provisions, as in the case at bar; (2) that limitation statutes do not apply when estoppel is present, as in *Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945 (C. C. A. 7); (3) where there is something akin to estoppel, actually a duty of consistency, it is controlling, as in *Alamo National Bank* v. *Commissioner,* 95 F. (2d) 622 (C. C. A. 5). Cf. *Stearns Co.* v. *United States,* 291 U. S. 51, 61-62, to the effect that, irrespective of a limitation in a taxing statute, "no one shall be permitted to found any claim upon his own inequity, or take advantage of his own wrong".

The multiplicity of suits resulting from the confusion surrounding this question is discussed at page 8 of the Petition for Certiorari in the case at bar.

IV.

Both Parties Desire Certiorari.

In the case at bar the United States and the petitioner agree that the *McEachern* case, relied upon by the Court of Claims as authority for its decision, is erroneous.

The "Memorandum for the United States" in the case at bar states:

> "We think that the statutory provisions relied upon in the *McEachern* case were not intended to render the rule of *Stone* v. *White* inapplicable, and that the decision in the *McEachern* case is erroneous. • • • Since we think that the *McEachern* case is erroneous, *we*

would welcome a re-examination and do not oppose certiorari if the writ were granted for that purpose." (Italics supplied)

Respectfully submitted,

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April 30, 1942.

CERTIFICATE OF COUNSEL

ROBERT ASH, counsel for the above-named petitioner, does hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

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